PUBLIC SERVICE LABOUR LAW – QUESTIONS OF TODAY AND LEGISLATIVE RECOMMENDATIONS[1]

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Introduction

I believe, placing the legal status of public and civil servants on common bases would be an unprecedented and until now avoided legislative task in Hungary. ”Shepharding” the ones directly or indirectly fulfilling public authority duties as well as the employees of the budgetary institutions completing modern state and self-governmental duties (health, public education, public culture) into one legal relationship. The successful codification would end the unjustified duplication, which is exclusively based on the circumstance that civil servants, unlike public servants, are involved – a majority of them rather indirectly – in the exercising of state authority. After all, the difference is not that significant, as a result of which the legal statuses of public and civil servants could not be organized in one legal act. Therefore, as a conclusion of my research, my recommendations concern the scope and relations governed by Act on the legal status of public servants (Kjt.) and (Ktv.), the uniform regulating of the public service labelled as civil. The assignment is not discretionary, on the one hand, based on professional aspects, I find the „melting” of these two acts executable from a legislative point of view, on the other hand, public and civil servants form the centre of the entire public service whereas a significant part of the employees belong to the mentioned two categories. The writing of the thesis is of course similar to a laboratorial experiment, not detached but still far from reality.

[1] My work is based on the statements of my PhD diploma called ”Diagnosis and therapy – recommendation for reforming the Hungarian public service – with regard to the legislation of the EU member states, our national past and present” defended at the Scientific University of Pécs in 2006.

Actuality of the subject matter

Two circumstances make my thesis especially actual: firstly, parallel with Hungary joining the European Union, the issue of harmonization of the public service to the European norms had arisen (however, not based on the harmonisational requirements), secondly, the incoordination and contradictions of the Hungarian regulations having been in effect since 1992, nearly transmitting a sense of invariability.

I have excluded from my research the analysis of the remaining five public service acts because in my opinion the nature of the activities fulfilled by public and civil servants do not contain such significant difference that would in short distance eliminate their uniform regularization. The final statement of a professional conference held in 1998 supports my conception, which, besides practical reasons refers to our historical circumstances when recommending a public service act covering the scope of both Kjt. and Ktv. excluding from the circle the integration of the service relations. There is no theoretical impediment against the extension of the scope of the uniform public service as a next legislative step performing the integration of the regulations governing the employees of judicature and prosecution. The subject of my thesis provides recommendations for the first, realistically acceptable experiment, the successful accomplishment of which may provide objective grounds for the mentioned extension of scope. With regard to the condition of judicature, the legal status of judges cannot be drawn into the subject matter of my recommendation, and also, I do not find the integration of the legal status of prosecutors possible.

Reasons leading to the duplicated civil pubic service and its conservation

I recognize the duplicated regulation of civil public service as a faulty legislative consequence of the labour law ”system change”. The liquidation of the earlier uniform system being generally insensible to the legal status and function of employers had been an inevitable requirement of the establishment of trade economy. By creating the labour code purposely focusing on the competition sector, the separate labour legislation of the public service on statutory level had been inevitable. However, I cannot evaluate it as inevitable that the budgetary institutions performing the public duties and services of the state and self-governments as employers „could not get under” one single act. The obvious difference between the civil and public servant legal relationships is the practice of public authority with different magnitude appearing in the former. However, the separated labour legislation of the competition (non-profit) sector and the public sector did not justify the so-called ”trichotomy” statutory struc-

ture. None of the national laws examined during my research divide its public services into two camps according to the Hungarian ”public-civil servant” classification.

Basically, the Hungarian public service regulations include seven legal acts. The scope of one of the legal acts, the Kjt. being in the focus of my thesis contains the activities and services undertaken by modern state and self-governance which usually do not include the practice of public authority, especially healthcare, tutoring, education and public culture. The other act, the Ktv. regulates the public service-labour law circumstances as regards the ”civil” public authorities, central administrative institutions, self-governmental offices. The governmental power, based on which it is decided by a decree which institutions fall under the scope of subject of the Ktv. is rather questionable. Summarily: it depends on a single governmental decree who shall be a civil servant …

The reasons behind the duplication of the civil public service labour law are rather pragmatic than theoretical. On the one hand, as of 1990, based on the governmental allocation, the preparation and maintenance of the civil servant regulations belonged to the duties of the Ministry of Internal Affairs (as of 2006, the Prime Minister’s Office) and that of the public servant regulations belonged to the duties of the Ministry of Labour. On the other hand, the circumstance generating the criticized ”trichotomy” legislation and resulting in its long period conservation is the lack of material resources, which do not ensure the simultaneous levelling and development of different fields. At the beginning of the legislative process, all of this appeared in an insolvable difficulty of comparison in one single act, the classifications, the rejection of the uniform handling of the scope of duties of the public servants and the activities of the civil servants when determining their salary, built an absolute barrier before the uniform regulating. The ministries on top of the sectors prevent all integrating attempts risking internal, sectoral comparative advantages. In order to support my statement, I shall mention the doom of the governmental reform aiming to establish the uniform public service that was introduced in 2002 than stopped in 2005.

Legislative deficiencies and aspirations in the history of Hungarian public service

I discovered during my research of the Hungarian legal history that the regulating of public service had constantly been under the critics of jurisprudence in our modern history following the Settlement. However, theories and details concerning the uniform regulating had never stepped out of the frame of publications and the desired and planned public service pragmatics had never reached statutory level.

From Settlement (1867) until 1945

After 1867, with the lack of comprehensive legal provisions for public service, the different issues of the service rules of the Ministry of Finance were applied to all sectors of state service. Only provisions for particular areas were introduced, such as the statute of 1885 on the retirement of state officers or the statute of 1886 on the disciplinary procedure of municipal officers. I evaluate the statue adopted in 1883 on the education of civil servants as a major step in regulating the public service of Hungary, which although did not supplement the uniform regulation but its scope in fact exceeded its title and set up important requirements for the rules of conflict of interests concerning ethical, political, proprietary and further activities against the servants.

Even with the absence of a coherent and comprehensive regulation for public service, governments of several eras set the target to come up with a uniform regulation. The speech from the throne that was read on the occasion of opening the parliament of 1892-97 instructed the government to pass its bill before the Chamber on regulating the legal relationships of servants. After World War I. Prime Minister István Bethlen determined the old-new goals. In the early 1930s Zoltán Magyary had been asked by the prime minister's office to be in charge of the inter-departmental committee aiming to simplify and improve state administration. As a result of the consequences of the lost world war, the world economic depression, and the missing reforms of the society and state structure, the substantial reform of governance needed to be done without any delay. Intellectual munition was only available from the science of governance or the scientific approach it represented. In 1932, as a governmental commissioner, Professor Zoltán Magyary prepared a detailed programme on the draft of the service pragmatics, which could not be submitted to the government. However, it is beyond doubt that the provisions for public service determined by the legislation of different statutory level and the decisions of the Supreme Court contained precedential provisions for several legal institutions (e.g. remuneration, termination of legal relationship).

From 1945 until the change of political structure

In the system following 1945, that regulated the world of labour homogeneously, I evaluate decree 38/1973. (XII.27.) of the executive council as an outbreak from the uniform conception mixing together the relations of the public and economic sector based on the domination of public property that determined some of the questions of the employment relationships of the employees of administration and judicature. The legal regulation, as its title tells, did not determine a substantive relationship but defined specific conditions within employment, which later necessarily became part of the individual, separate public

service relationships. On the one hand, the decree of the executive council contained increased requirements as opposed to the general employment provisions, on the other hand, it provided greater employment assurances. As an example, on the one part I would mention demanding Hungarian citizenship or a crimeless record for employments being commenced by an appointment, swearing, conflict of interest in the case of executive employees commencing further employments, stricter pecuniary and disciplinary responsibilities than that of the general labour regulations, on the other hand executive officers and those having worked in the administration or jurisdiction for at least 15 years enjoyed an increased termination restriction than that of the labour code of the time, or the assignment of titles and the base wage bonus connected to it.

From the political change …

It is one of the mistakes and consequences of the labour law system change that the preparation of the public service act with the career system (life achievement) being in the centre was missed when the economic and public sector had been divided. The trichotomy system of legal acts finally introduced in 1992 (Mt-Kjt-Ktv.) is unfamiliar in the legal system built on the dualism of public-civil law.

OECD and European Union frameworks – tendencies with impact on Hungarian legislation

Based on the researched foreign literature it is to be noted that: earlier, the detailed researches dealing with the changes occurring in the European labour law relations were rather based on the experiences gained in the private sector. The increased inquiry towards public service, emphasizing that the comparison of national systems is no longer merely a scientific or political interest, has been generated by the European integration.

Boarders of public service

It needs to be clarified what the researched nations consider as public service and how the terms of employment are determined. In the majority of the OECD countries, this definition is not limited to administration. Although, the definition differs from member state to state, more or less the scope of the Kjt. and of the Ktv. is covered, as well as that of the service acts; furthermore the employees of jurisdiction are to be listed in the circle. Several EU member states try to give a definition to public service in legislation. The statute of some of the EU member states with written constitutions cover certain subjects of public service, however, those member states belong to the populous group, which de-

termine specific provisions for separate public service areas besides the constitutional provisions. Some of the countries provide detailed provisions for public service in their constitutions. In Great Britain, unlike the above stated, where no constitution exists, legal regulations do not concern public service, but determine the competence of each of the institutions, and this is how the legal status of the employees can be concluded. It is a new tendency that more and more EU member states regulate separately the legal relations of those, who work in the public service based on a civil law contract and not a traditional appointment.

Modernization of public service

In the advanced countries, the modernization of public service has been on the agenda since the middle of the 1980s. The number of employees is one of the substantial operational criteria of public service. According to the surveying of OECD, the modernization plans besides recording the measurable capacity goals and decreasing the administrative liabilities did not change the relative magnitude of the public service: practically, the proportion of those employed in public service compared to the total number of employees as well as the expenditure spent on public service compared to the gross national product remained unchanged. An important statistical result is that in Hungary, compared to the 15 member states of the EU, there is no over-employment in public service.

The last one and a half decades have been unusual for public services in Europe. Being worried about the effects of financial depression on macro economy and simultaneously, the insistent attempt to reform the governmental and employment structure of administration has become determinant. For national governments, however, restraining public expenditure has been a necessary but not satisfactory criterion for achieving a competitive economy and it became evident that the structural re-examination of public service is inevitable. Literature uses three expressions for the process with respect to its overall strength, depth: conversion, modernization or fallback.

Within the European Union, the doubts concerning the efficiency and quality of service resulted in a similarity in regulating the public service employment of member states. In some of the countries on the other hand, the progress of conversion in the case of state and employers or the reform in the case of trade unions has partly contested and eroded the detachment between the employment conditions of the public and private sector. The convergence between the member states cannot be considered as strong. Beyond doubt, globalization, organisation policies of multinational companies and the European integration have a compelling influence on the conditions of employment, all of these have

an effect on the convergence between national public services, however, the force is not as strong as in the competition sector. For example, one of the dominant unifying forces in public service, the social conversation on European level is completely missing. Stronger is the increase of convergence in the member states as regards the employment conditions of the public and private sector, but this fact, according to international literature, is partly shaded by the „pre-occupation" with the comparison of incomes in the public and private sector within the member states. The governmental endeavours lead towards taking over the private sector practice, therefore, the same concerns come forward as in the competition sector with regard to the increase of wage costs and the increase of flexibility of the labour-power.

In all OECD countries, reform programs were initiated to reorganise the tasks of the public sector, in order to achieve a public service that is more efficient and conforms to the needs of those taking the services in a better way. In human resource management there are many congenialities or similarities between the public and private sector, and it is a determinative experience for the codification as well. Thematic endeavours of OECD countries worked out at the millennium: efficiency, redundancy, decentralization, flexibility, independence and responsibility in using human resources. Central governments and local self-governments wish to provide a model with their employment policies in the entire employment market. During my researches I found that different reform programs are introduced to similar goals, which are determined especially by the economical situation of the given state, the 'colour' of the government, the legal tradition as well as the level of control and depth of the social conversation.

Monetary pressure

Pressure urging reforms are primarily supported by the high level of public expenditure that can have a damaging impact on national competivity in the globalized world economy. These macro-economy necessities were strengthened by, giving final impulse for the reforming of public service, the Maastricht convergence criteria (the condition for the introduction of the common payment instrument, the Euro by the member states with respect to the GDP, budgetary deficiency and state debt), which are required for gaining a membership in the economic and monetary union (EMU) and for the execution of the provisions of the expansion and stability pact upholding the pressure on the budgetary policy of the member state governments. To macro-economic factors micro-economic scepticism was added. The question is, whether the traditional forms of the public service legal relationship can provide the affirmation and safe-guarding of those working in the public service and the sufficient provi-

sion of services, reflecting all these to the increased expectations of the society regarding the quality and efficiency of public services.

It is generally accepted that efficiency is worse in the public sector than in the competition sector. Within the characteristics of the work intensity of public service, efficiency resulting from technology innovation tends to increase limitedly. It is widely known that inflexible employment solutions and limited progress options also contributed to the low performance and that the employees were unmotivated.

The community expectations were considered as a restraint for governments to cut back public expenditure, this way risking the maintenance of some part of the positions in the public sector. In many countries without doubt, the Maastricht criteria have had significant influence on changing the expenses spent on public service, however, the monetary expectations of the EU increased the unemployment rates and the costs that belong to it as well. The limited influence of the national economy policies has even more turned the attention of the governments to the salary and employment policies of the public service.

Increasing the role of employers

Several proposed structural and employment reforms support the increase of the role of public service employers, but at the same time, the mentioned direction necessarily forces the financial control of employers. In the last couple of years, a shift has happened from the rather exclusive identification of the employment relations of the public service with the collective agreements and the institutions of legislation towards the consideration of employer's strategy. Long term experiments were held in several countries to decrease the control in public service to employer level, very often alongside with strict central governmental regulations. I have registered initiatives to strengthen the role of employer management, especially in sectors such as the health sector, which faces serious financial pressure. However, all in all, competition sector-like efficiency cannot be expected from the afore-mentioned tendencies. The statement comes from the distinguishing characteristics of public sector management, since the majority of executive officers, as opposed to the private sector, are members of a trade-union, on the bases of which the executives very often share the values of their subordinates, they embrace their endeavours.

Decreasing comparative advantages – decentralization and flexibility – ethical norms

In several OECD member states, the stability of employment as a public service merit has amortized, on more and more occasions in public service servants are employed for a specified term. The circle of legal instruments guar-

anteeing employment is decreasing, challenging this way one of the attracting, comparative advantages of public service over the private sector. When examining the workforce of OECD countries I found redundancy progresses to which diverse methods are applied. According to one of them, the total number of workers has to be decreased by an annually determined percentage in every year, based on the other method, the workforce in public service decreases due to privatizational reorganisation or other institutional reforms. In the previous decade, the number of workers in public service decreased significantly among several OECD countries (e.g. United Kingdom, Sweden, Finland, Italy). According to my research, dismissals executed in the name of cost saving and efficiency have resulted in undesirable consequences. First of all, finding a job for the dismissed servants in the private sector requires an active employment policy and training programs. Dismissals also very often lead to the decrement of the quality of public services.

Public service codification has to react to the expectations of the human resource management, furthermore, means need to be found in order to achieve the goals of human resources – administration. Within the frames of the OECD, decentralization and flexibility are especially dominant aspects. The duties are delegated from the central institutions to executive level. The method of human resource decentralization is the entire authority of staff and mass wage management built on the level of administrative institutions. In the countries, which applied a rather centralized control previously – Hungary as well –, decentralization is materializing continuously and in sections. Framework regulations are still executed centrally as regards the grading, salary systems, the conditions of work and the rates of employment.

The need for setting general behavioural and ethical norms beyond legal regulation is a sensible point, and all this is especially true due to the growth of individual responsibility as a result of decentralization. At the time of the examination of the public service regulation, several countries chose the solution to bring established ethical norms up to statutory level. During this process, property statements and control systems are widely used and applied in order to achieve transparent and accountable public service.

Out of the problems arising along with the new tendencies, it has to be stressed that while the stability of employment in public service is decreasing, the legal opportunities containing previous privileges are changing, collaterally with it, the salaries and benefits do not increase in a proper degree compared to the private sector. As a consequence of the reforms, the comparative advantages of the public sector over the private sector are decreasing or disappearing and finding qualified manpower and especially employing executives in the public sector is becoming more and more difficult. The process of decentralization

decreases the uniformity of the public service. In several countries, a separate body of high officials has been formed to manage somehow the deficiency of executive employees. This body retains the generally shrinking and disappearing comparative advantages (e.g. outstanding remuneration, other benefits).

Qualification management may induce generation conflicts between the less adaptive older generation and the more flexible youngsters holding up-to-date knowledge. The collision is a new dimension, in which legislation has to take a stand, for the disparity between the traditional public service values and the new demands of the rapidly changing society.

State intervention – with limits

The role of the state with its unique legal and administrative characteristics remains determinant in the changes of the public sector. Based on my researches it can be noted that the regulating and sociology of public service are decisively affected by the fact that public services, as opposed to the private sector influenced by globalization, cannot be relocated from one country to another. At the same time, all of this has a determining impact on the erosion between the labour relationships of public and private sectors, eliminating the 'final collapse of the walls' where tradition has strongly separated the regulations of these two sectors. Public services have developed along centralized, hierarchical and technocrat lines rather based on administrative law, many times within the frameworks of the unilaterally adopted regulations of the government, as opposed to the regulating of labour relations. Despite the civil law effects, the establishment of the national frames of public service labour relations belongs to the interests of political parties and social partners.

As of the 1990s especially, the transforming economical environment created tension in the leading forms of public service employments. Restructuring of public services was the primary goal of state intervention with the expectations that it would change the employment conditions as well.

Relief of hierarchy – performance instead of carrier

In the traditional bureaucracy model of Max Weber, administration operates hierarchically, where the 'manager approach' dominating the private sector can be applied with difficulty and only in definite areas. Responsibility and resource decentralization although being a fundamental principle in the private sector, here it can only be applied with breaking down the traditional hierarchical ranks. I evaluate the introduction of the management and organisation method called New Public Management that was successfully introduced in the public sector from the mid 1990s, as one of the elements aiming to improve the efficiency and quality of public service, by which, performance orientation was

to be adopted in the public sector. Some form of the remuneration system depending on performance is used in the EU member states everywhere, with the exception of Luxemburg, although with different purport. The human resource side of the goal is the application of the remuneration system depending on performance, since state budget, within the ever growing public expenditure, is largely burdened by salary type costs and expenses. This way, the expenses of the public sector being operated by the contributions of taxpayers can be held in a controlled channel. Further goals can be concretized, this way the increase of the individual motivation of those working in the public sector, making public service more appealing in the labour market as well as the increased satisfaction of the demands against the public sector. All this, by applying the remuneration system depending on performance, shall mean the questioning of the entire carrier system-based public service. However, in the majority of the EU member states, a carrier system-based public service functions, where the labour market balance between the public and private sector is ensured, although many times at a reduced level, by the comparative advantages. A determinant factor in this system is the safety of employment, advancement and the guaranteed amount of salary connected to it over the more uncertain conditions of the private sector that ensures higher wages. The remuneration system depending on performance partly challenges the firm grounds, since the positive and negative performance deviation sooner or later influences not only the remuneration system but the stability of employment, too. Losing the classical values may result in the collapse of the entire labour market balance.

Based on working through the foreign literature, the introduction of the new system causes several difficulties. The public service apparatus is suspicious about it, most of the initiatives are only considered as experimental programs and there is no trustworthy information available on its effects. The negative effect, which creates a sense of punishment in those achieving average performances against the ones providing higher and better performances, is an important physical discomfort. All this may cause the decrement of the average level performance perspectively. A further problem is that in some part of the public sector the determination of performance indicators is rather difficult. The evaluation of performance is also of subjective nature, usually being the duty of the immediate superior. The approach of the bureaucracy being always aversed from the changes can only be altered, if the system of performance evaluation is less subjective, and the procedure controllable and transparent. Until now, based on the researched literature, none of the systems in operation have met the listed expectations. Furthermore, no surveying has been made anywhere, which would have unambiguously proved what effects does the new system have on the quality of services and human resource management of the given institution.

Trade unions

For trade unions public service is one of the critical places of practising economical and political influence. However, they have to face the ever decreasing number of members and the constant pressure of the employers with the demand of flexibility. The most important question is how they can mobilize their members, embrace their interests, and speak in such way, which sustains solidarity, ensuring organisational power and cohesion. Many trade unions "emerged" from professional organisations, while employment condition replaced privileged professional goals. Public service trade union activity appears primarily on national level and concentrates on the maximal influencing of governments. One of the reasons behind it is the centralised level of determining remuneration and trade unions had a prominent role in creating the state welfare policy. The decentralisation endeavours the near past and the tendencies heading towards agreement limit the afore-mentioned position of trade unions and forces the representative bodies to work out new strategies in the close future. It is to be noted that public sector trade unions have several advantages over the private sector organisations, last but not the least because of their high number of members. They hardly or do not have to face the inamicality of the employers during the recruitment of members; there are only few organisational restraints since the members tend to congest in the major employment units with great stability.

The greatest challenges for trade unions are the initiatives that are supposed to cut down the privileges of the public service employment statuses. Among these should be mentioned for example the decrease of employment stability, the spreading of atypical forms, performance requirements coming to the fore washing partly down the distinction between public and private sectors. A question relating to national legislation: to what rate can trade unions be drawn into the formation of public service?! All of this is different in three significant states of Europe. In Great Britain, trade unions were not only excluded from the reforms, but these organisations were referred to as the drawbacks of changes. In France, the government was hesitating about drawing them into the reforms, and its downfall well proved the risks of it. The other aspect of the reform is characterized by the efforts to reach a consensus. A perfect example of it is Germany, where the government invited the trade unions to the discussions on modernization.

The role of collective agreements – new conflict sources

In public service the collective agreement forms, which are dominant in the private sector have an important regulating role, however, parallel with it, the state's role of adopting norms is significant. Unsteadiness is found when evalu-

ating whether the demand for close control over the expenditure of the public sector can be harmonized with ensuring the freedom of concluding collective agreements by the employers and trade unions. Inspite all this a general change can be experienced towards the acceptation of the right of a greater part of public service employees to enter into collective agreements, however, a few employee groups remain outside the collective agreement mechanism (e.g. the civil servants in Germany). The decentralized collective agreement is different in the public or private sectors. In the private sector the parties are entitled to decide on the subject and content of the agreement within the frameworks of the legal regulations. In the public sector, however, the starting point in the process is the state, being responsible for determining the salaries. Therefore it usually determines itself the possible scope of subjects that are subject to collective agreement provisions and at the same time transfers the responsibility of adopting legal regulations to the employers and trade unions of the public authority and service.

Besides the collective bargains, the conditions of employment are influenced by the lobby activities of the social partners. Also very good examples of this are English and German experiences. All this is especially used by employment organisations, where there is no possibility for a collective deal.

There is an intensive change as regards labour conflicts, public service has become by far the most interesting 'battle field'. We might face a variety of conflicts, starting with privatization and the defending fights against the increased burden of work to end with the offensive actions of professional groups and the critics against professional trade unions being unable to successfully protect the interests of employees. Due to decentralization, employers' managements at local level have a wider possibility of reconsideration in order to establish the co-operational forms of labour relations with trade unions.

A few general viewpoints for legislation

Handling phase lag

While the former members of the EU, on the turns of the 1980-1990s began to reform, reshape and make their public services more effective due to the impact of globalization and under the aegis of the Maastricht convergence criteria, so long in Hungary the most important duty, because of the political system change, had been the separation of the labour regulations of the public and private sectors. Phase lag should not cause haste. Unfortunately, the chance for it is increased by the four-year long election cycles that disport legislation.

No foreign model to be adopted

Looking at the – for us – many times authentic OECD frames, which basically includes all of the EU member states, I did not find a generally adoptable model for our national legislation. The differences may exist for a longer period of time, because on the first part, national public service regulations are based on historical traditions of centuries, on the other part, there is not a uniform EU expectation either, the Community primarily focuses on the approach of national labour regulations of the private sector.

Competitive spirit, comparative advantages, tradition

Like in Europe, or within the frames of the OECD, the analysis is unavoidable in Hungary as well, determining which legal institutions of the competition sector labour regulations could be applied in the public sector, even with little alterations. However, the uniform Hungarian public service recommended by me, with respect to our social relations, the conditions of the social conversations and our ability of self-care has to ensure the comparative advantages over the competition sector. Just like in other EU countries, historical traditions have an effect in Hungary. This places the relatively more powerful state in focus, being able to guarantee the comparative advantages. Beside this our public law traditions are also determinative. Although with a different character, but state intervention in the public sector was strong in Hungary during the dualism era and between the two world wars as well as in between 1945 and 1990 and also following the political system change. Since 1973, as regards the scope and subject of the legal regulations, even if not entirely, distinguished applicational provisions were in effect concerning some part of the public service, and two years after the political system change, public service was detached from the labour code of the private sector.

Establishment of the legal policy

The greatest problem of the Hungarian legal policy lies in its non-existence. The first step was already based on a mistake, when the regulations of the public and private sectors were separated meeting the requirements of the market economy, but with the duplicated regulating of the civil public sector the seeds of new difficulties were planted that not only effect the present but even the future. After 1992, the succeeding governments independently of each other modified the Kjt. and Ktv. rarely paying attention to coherence. Especially, besides the budgetary pressure of meeting the requirements resulting from the EU membership it is an expectation that budgetary pressure should not be exclusively the prime determinative factor when building up the concept. Another aspect is the reality of the legal policy goals and the level of motivation of the

majority of the departments. Achieving the coherence of public service regulations without the necessary arguments and power to break down the internal resistance is not possible.

The labour law of the public service – the dilemmas of allocation in the legal system

How to allocate the labour law of the public service in the legal system? Agreeing with the reasoning of professor Kiss György, the dogmatic distinguishing between the public service legal relations and private labour relations can be debated inasmuch as both of them are the legal manifests of the dependant work. Labour law is to be applied as a general notion, which incorporates the private law of labour and all the varieties of public service, as the public law of labour. It is to be determined on the apropos of the convergence experienced between the regulating of private and public service: while the legal dogmatical establishment of the collective labour law is possible within the private labour law, in public service based upon external influence, as a result of a longer advancement. With regard to those employees, who work in organisations providing public services outside of public institutions, functionalism may extinguish the fundamental dogmatical principals, based on which, either the regulations of the public sector or that of the private sector may be applied. As opposed to the private law principals, in public service the autonomy of the individual in some areas cannot be applied, in some areas only with limitations.

According to my point of view, the difference between the labour regulations of the competition and public sector have decreased, convergence has its limitations. Without breaking the borders of the public service, the application of certain private labour law solutions is reasonable to liquidate the exaggerated centralization, for example ensuring the regulating of collective agreements for certain legal institutions based on an itemized legislative authorization. I do not find it absurd, that the personal scope of these would cover the legal relations of all of the employees, therefore that of the present civil servants as well (e.g. the collective agreement of the self-government would cover the mayor's office besides the sustained self-governmental institutions like school, hospital).

What evaluation shall be made concerning the 'privatization' of the public service regulations, with different significance by states? The answer lies within the consequences: Don't the private law endeavours break the frames of the public service, that operational mechanism which ensures the whole of the immensely differentiated services that are permanent for the society, is it possible to retain public service, by upholding the comparative advantages, that are by no means typical of the private law, or establish public service as an appealing workplace avoiding contra-selections that have negative effects in mass

dimensions. If some of the private law institutions provide better efficiency, cost savings, rationality and workplaces of instanced value, then their appearance in public service is to be supported. The convergence of public-private law can only be the means and not the goals of the modernization of public service. The unjustified 'liquidation' of some of the legal institutions also referred to as comparative advantages, with the lack of social conversation as efficient defence, would lead to a public service that is cheap but not cost saving, unbalanced in consequences and provides law quality level.

The structure of public service legal regulations

The regulations governing state and self-government public service are to be partly separated. Especially regarding the remuneration system, self governments are entitled to deviate from the regulations governing state public service in favour of their employees, exclusively from own financial resources, by adopting their own resolutions or in a collective agreement. However, with proper, guaranteed low limits, it should be allowed to deviate in a negative way from the provisions of the public service act concerning those employed by the state with special respect to the economical situation of self-governments.

For collective agreements governing public service relations, a wider role needs to be ensured than the one in effect and it should be applied in a more integrated way. However, as opposed to the general norm of the private labour law, the collective agreement would govern the terms concerning public service relations only upon legislative authorization. The introduction of a two-level collective agreement system is justified, the agreement with a wider scope is to be concluded by the employer (state or self-governments) and the trade unions qualified as representative in public service. As regards its content, this agreement would govern primarily the questions of remuneration-advancement. The collective agreement with a narrower scope is concluded by the budgetary institution and the local representative of the trade union, primarily, regulating the questions relating to work and work organisation.

Viewpoints to the determinative elements of the codification

The following highlighted viewpoints should be considered during codification:

Withdrawal of scope

The scope of the public service act covers the present public and civil servant relations. It is possible to unify these two sectors of the public service because the difference between the activities of the public and civil servants does not

itself provide legal grounds for regulating them in a separate legal relation, in a separate legal regulation. The differences originated from the practice of state authority affecting the content of the legal relationship and the conditions of appointment (e.g. conflict of interest, obligation to make a property statement) can be handled within one single legal act by adopting special provisions.

The material scope of the public service act covers the employer's organisations belonging to the scope of the present Kjt. and Ktv. Parallel with the adoption of the act, it is reasonable to shift those budgetary institutions operated by the state and self-governments from the scope of the public service to the labour law regulations, along with their reorganisation as a business association, whose alternatives, just upon the decision of the operators, cannot be found outside the public service (e.g. some of the cultural institutions).

All of the above stated propose the reviewal of the labour statuses of the so-called public companies (companies exclusively owned by the state or self-governments or companies with state or self-governmental majority control), and the eventual intensification of the state proprietary approach of legislation (e.g. a possibility included in the collective agreement to deviate from certain provisions of the Labour Code or the limitation of the parties' freedom of consensus, the relatively dispositive nature) or the extension of the legal institution of public service agreements to this circle.

The precondition for defining the personal scope is to review, which activities belong to the public service or looking through reversed optics, which activities should or could be reorganised and performed based on a civil law agreement (pl. catering, transport, guarding of institutions, delivery). The present public and civil servants are in public service relationships, with respect to the recommended material scope, under the title of public service employees. Naturally, the uniformity of the relationships does not result unreasonably homogeneous regulations, as it is indicated in my thesis: the special provisions of the uniform public service act ensure the adoption of those provisions that meet the requirements arising from the different nature of the activities.

The present administrators and physical employees of the Ktv. are employed based on public service agreements as well as those public servants that are employed by institutions belonging to the scope of the Kjt. without fulfilling meritorious activities and lacking any professional careers. The provisions to be adopted as an individual part of the public service act would on the first part ensure an increased legal protection for the public service agreements compared to the private labour law provisions, however, on the other hand they would not allow generally, neither in the collective agreements nor in the public service agreements, the application of the relatively dispositive nature.

The person of the employer and decentralisation

By terminating the problematics of the formal employer's position of the budgetary and public institutions, especially in budgetary issues, the state and self-governments are defined as the person of the employer as an entity of labour law. The budgetary and public institutions presently being in the employer's position operate as some kind of a place of operation.

Decentralisation, based on European experiences as well, is an essential precondition for effective public service. Our before-mentioned recommendation for employers becoming legal entities does not intend to make the present system even more bureaucratized, but on the one hand, its goal is to stabilize the public service, on the other hand, to 'shepherd' the determinative decisions effecting the employer's position and the public service relationship into one organisational frame. Decentralization in our recommendation shall mean the delegation of the employer's powers and the connected budgetary sources to the appropriate level. All of these are adequate means to guarantee the joint criteria of safety and efficiency as well as the operator's controlling opportunity.

Comparative advantages – with requirements

The remuneration advancement referred to as the soul of public service is based upon three components: the time spent in public service relationship, achieving professional advancement (carrier requirements) and the financial consideration paid under a different legal title based on the evaluation of the performance of duties.

The uniform public service act needs to establish the comparative advantages that are provided to the public service employee, subject to the proper selection method and the fulfilment of professional requirements, differently from the employments that are based upon private labour law. We shall call it as the well-deserved safety. This shall mean the stability of the legal relationship, that is guaranteed by the recommendation on the reorganisation of the employer, the additional considerations besides the remuneration partly available in the effective provisions of Ktv. and Kjt., the system of social contributions and the foundation of a public service health and pension insurance fund of the distant future (see the system between the two world wars!).

Three criteria for a successful legislation

The existence of three conjoint criteria is necessary for the formation of a uniform public service: professional skills, disposition over budgetary sources, and power to adopt the legal act. As the governmental materialization of all of the above, the establishment of a public service ministry is well founded along with the simultaneous decrement of the scope of other departments.

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SUMMARY

Public Service Labour Law – Questions of Today and Legislative Recommendations

ISTVÁN HORVÁTH

The essay discusses the labour law regulation of public service – an area where in the author's opinion further regulatory steps should be taken in the future. In the course of the Hungarian legal history, a single law has never regulated the labour law aspects of civil servants and public employees. However, apart from certain contradictory components, the laws and decrees that regulated the labour law issues of civil servants and public employees in the period between the two world wars formed a coherent body of legislation.

The essay reviews the legal regulation of public service since the Compromise (*Ausgleich*) of 1867 down to the present day, and it finds that following the transition (1989-1990) a trichotomous system was created (without legal justification) in the otherwise dual structure of labour law. It is impossible to incorporate into the dual system of labour – which is separated into private law and public law – the separate legal status of public employees and civil servants. (Note that those in public service have been assigned into two separate groups: civil servants and public employees only under the pressure of extraneous financial considerations.) The study presents how these issues are regulated in Member States of the European Union and those of the OECD. Issues that are considered include monetary pressure, decentralization, the growing role of collective agreements, the assertion of the efficiency principle, and emphasis on better performance.

The author puts forward a recommendation about the main points of a new law that would regulate public service in a uniform structure and with uniform principles. Emphasis is placed in the essay on the following aspects of the proposed new law: its structure and scope (categories of activities and persons); changing the legal status of employers from the viewpoint of the new law; the system of pay and promotion; comparative advantages of public service that would guarantee the recruitment and retaining of apt people. Finally, the essay discusses the three main preconditions that need to be simultaneously ensured for framing that new law: expertise, sufficient clout for the drafters of the new bill and financial resources to implement the related reform.

RESÜMEE

Arbeitsrecht im öffentlichen Dienst – Fragen der Zeit und Vorschläge für die Gesetzgebung

ISTVÁN HORVÁTH

Die Studie beschäftigt sich mit einem bis heute ungelösten Gebiet der ungarischen Gesetzgebung, der arbeitsrechtlichen Regelung des öffentlichen Dienstes. Wenn wir uns die ungarische Rechtsgeschichte anschauen, so gab es nie ein in einem einheitlichen System kodifiziertes Recht im öffentlichen Dienst. Gleichzeitig bildeten sich aber – neben bestimmten Widersprüchen – in der Zwischenkriegszeit mehrere Regelungen bezüglich der Angestellten im staatlichen Dienst, bzw. im Dienst der Selbstverwaltungen heraus, die trotz unterschiedlicher Rechtsquellen grundsätzlich kohärent waren.

Die vorliegende Arbeit verfolgt die Vergangenheit des öffentlichen Dienstes vom Ausgleich bis zur Gegenwart und deckt das im Anschluss an die Wende – aus rechtlicher Sicht unbegründet – geschaffene trichotome System in der Regelung des Arbeitsrechts mit dualer Struktur auf. In die Aufteilung der Arbeit in privates und öffentliches Recht kann nämlich der separierte Rechtsstand des zivilen öffentlichen Dienstes (Angestellte im öffentlichen Dienst und Beamte), der infolge von finanziellem Druck verwirklicht wurde, nicht hineingefügt werden. Die Studie stellt zuerst die in den OECD- und EU-Mitgliedstaaten herrschenden Tendenzen (z.B. Zunahme der Bedeutung des monetären Drucks, der Dezentralisierung, der Kollektivvereinbarungen, Geltendmachung der Effizienz und des Leistungsprinzips) vor.

Danach macht sie einen Vorschlag zu den wichtigsten Punkten der Realisierung einer neuen, in ihren Prinzipien und ihrer Struktur einheitlichen arbeitsrechtlichen Kodifizierung auf dem Gebiet des öffentlichen Dienstes. Insbesondere beziehen sich die Vorschläge auf die folgenden Gebiete: Struktur der vorgestellten Regelung, sachlicher und persönlicher Anwendungsbereich, Änderung der Rechtstellung des Arbeitgebers, System des Gehaltes und des Aufstiegs, sowie komparative Vorteile, die die Anwerbung und die Bindung der qualifizierten Arbeitskräfte gewährleisten. Schließlich nehmen die Vorschläge Bezug auf die drei konjunktiven Voraussetzungen, die zur Verwirklichung von alldem notwendig sind: die gemeinsame Verfügung über das Fachwissen, die Macht und die zur Reform notwendigen Ressourcen.